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10 **UNITED STATES BANKRUPTCY COURT**

11 **DISTRICT OF NEVADA**

12
 13 IN RE) Case No.: 18-16355-BTB
 14 MARQUE MOTOR COACH, LLC,) Chapter 11
 15 Debtor)
 16) MOTION TO COMPEL ASSUMPTION
 17) OR REJECTION OF UNEXPIRED
 18) LEASES
 19) Hearing Date: **January 29, 2019**
 20) Hearing Time: **10:00 a.m.**
 21)
 22)
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 24)
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20 Wells Fargo Equipment Finance, Inc., a Minnesota Corporation (herein, "**WFEFI**"),
 21 by and through its attorneys, Smith Larsen & Wixom, hereby files this Motion to Compel
 22 Assumption or Rejection of Unexpired Leases. This Motion is made based upon 11 U.S.C. §
 23 105(a) and § 365(d)(2) of the Bankruptcy Code for an Order compelling Marque Motor
 24 Coach, LLC, debtor and debtor-in-possession ("Marque") to assume or reject the unexpired
 25 lease described below. In Support of this Motion, WFEFI submits the Points and Authorities
 26 set forth herein.
 27
 28

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POINTS AND AUTHORITIES

FACTS

1. On October 24, 2018, Marque filed a Voluntary Petition for protection under Chapter 11 as Case No. 18-16355-BTB

2. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(a) and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A).

3. On or about December 23, 2015, in the State of Nevada, Clark County, Grech Financial Services, Inc., d.b.a. Edson Financial (“**Grech**”) agreed to extend a lease to Marque for a 2016 Volvo 9700 Motor Coach (“**467691-400 Lease**”). The 469691-400 Lease was, and is, evidenced by that certain Equipment Lease, dated December 23, 2015 (the “**467691-400 Agreement**”), executed by Jeffrey Whiteaker for Marque in favor of Grech. A copy of the 467691-400 Agreement is attached hereto as Exhibit 1 and is incorporated herein by this reference.

4. Under the original terms of the 469691-400 Lease, Marque agreed to pay Grech eighty-three (83) payments of \$5,459.00 and one (1) payment of \$84,000.00.

5. The 2016 Volvo 9700 Motor Coach serves as the collateral for the 469691-400 Lease.

6. On or about November 21, 2017, WFEFI and Marque entered in an Amendment which modified the payment terms of the 469691-400 Lease, extending the term to eighty-seven (87) months, with sixty-five (65) installments, composed of three (3) installments of \$1,895.72, sixty-one (61) installments of \$5,459.00, and one (1) installment of \$84,000. A true and correct copy of the Amendment is attached hereto as Exhibit 2 and is incorporated herein by this reference.

7. Grech assigned all right, title and interest in the 467691-400 Agreement to

1 WFEFI. See Exhibit 3. The 467691-400 Lease and Agreement are assigned WFEFI account #
 2 001-0467691-400.

3 8. As of the date of filing of the instant case, the balance of payments due under
 4 the 467691-400 Lease was \$17,728.08, post-petition missed payments totaling \$11,818.72,
 5 with current late charges of \$1,091.80, and with the total balance due of \$345,484.62.

6 9. Marque's Schedule D estimates the value of the 2016 Volvo 9700 Motor
 7 Coach at \$350,000.00 which WFEFI accepts as the value at this time.

8 10. To the best of WFEFI;s knowledge, information and belief, based upon Mr.
 9 Jeffrey Whiteaker's testimony at Marque's 341 meeting, the 2016 Volvo 9700 Motor Coach
 10 is located at 6625 S. Valley View Blvd., Las Vegas, Nevada.

11 11. On or about December 23, 2015, in the State of Nevada, Clark County, Grech
 12 agreed to extend a lease to Marque for a 2015 Mercedes Benz Sprinter Shuttle Bus (“**467691-401 Lease**”). The 469691-401 Lease was, and is, evidenced by that certain Equipment Lease,
 13 dated December 23, 2015 (the “**467691-401 Agreement**”), executed by Jeffrey Whiteaker for
 14 Marque in favor of Grech. A copy of the 467691-401 Agreement is attached hereto as Exhibit
 15 4 and is incorporated herein by this reference.

16 12. Under the original terms of the 469691-401 Lease, Marque agreed to pay
 17 Grech sixty (60) payments of \$1,866.00.

18 13. The 2015 Mercedes Benz Sprinter Shuttle Bus serves as the collateral for the
 19 469691-401 Lease.

20 14. On or about November 21, 2017, WFEFI and Marque entered in an
 21 Amendment which modified the payment terms of the 469691-401 Lease, extending the term
 22 to sixty-three (63) months, with forty (40) installments, composed of three (3) installments of
 23 \$344.91 and thirty-seven (37) installments of \$1,866.00. A true and correct copy of the
 24
 25

1 Amendment is attached hereto as Exhibit 5 and is incorporated herein by this reference.

2 15. Grech assigned all right, title and interest in the 467691-401 Agreement to
 3 WFEFI. *See* Exhibit 6. The 467691-401 Lease and Agreement are assigned WFEFI account #
 4 001-0467691-401.
 5

6 16. As of the date of filing of the instant case, the balance of payments due under
 7 the 467691-401 Lease was \$2,019.95, post-petition missed payments totaling \$4,039.90, with
 8 current late charges of \$373.20, and a total balance due of \$53,815.82.

9 17. Marque's Schedule D estimates the value of the 2015 Mercedes Benz Sprinter
 10 Shuttle Bus at \$50,000.00 which WFEFI accepts as the value at this time.

11 18. To the best of WFEFI's knowledge, information and belief, based upon Mr.
 12 Jeffrey Whiteaker's testimony at Marque's 341 meeting, the 2015 Mercedes Benz Sprinter
 13 Shuttle Bus is located at 6625 S. Valley View Blvd., Las Vegas, Nevada.

LEGAL ARGUMENTS

16 Section 365(d)(2) states, in relevant part:

17 In a case under Chapter ... 11 ... of this title, the trustee may assume or
 18 reject an executory contract or unexpired lease of ... personal property of
 19 the debtor at any time before confirmation of a plan but the court, on
 20 request of any party to such contract or lease, may order the trustee to
 21 determine within a specified period of time whether to assume or reject
 22 such contract or lease.

23 "Reasonable time" within which to affirm or reject a lease under 11 U.S.C. § 365(d)(2) is left to the
 24 bankruptcy court's discretion in light of the circumstances of a particular case. *In re Attorneys Office*
Mgmt., Inc., 29 B.R. 96, 98 (Bankr. C.D. Cal. 1983) (citing *In re Theatre Holding Corp. v. Mauro*,
 25 681 F.2d 102, 105 (2d Cir., 1982)).

26 Courts have used various factors to determine what constitutes "reasonable time" for
 27 purposes of § 365(d)(2) including: (a) the nature of the interests at stake, (b) the balance of
 28 harm to the parties, (c) the safeguards afforded to the parties, (d) the damage third parties

1 may suffer beyond the compensation available under the Bankruptcy Code, (e) the debtor's
 2 failure or ability to satisfy post-petition obligations, (f) the purposes of chapter 11, (g) the
 3 importance of the contract in relation to the debtor's reorganization, and (h) whether the
 4 action to be taken is so in derogation of Congress' scheme as to be said to be arbitrary,
 5 *Adelphia Commc'n Corp.*, 291 B.R. 283,292-294 (Bankr. S.D.N.Y. 2003).

7 Nearly 60 days have now passed since the filing of the instant case and Marque
 8 continues to receive the benefit of the 2016 Volvo 9700 Motor Coach and the 2015 Mercedes
 9 Benz Sprinter Shuttle Bus without making any payment or providing any consideration to
 10 WFEFI. This constitutes a substantial basis for requiring Marque to make an immediate
 11 determination to either assume or reject the 467691-400 Lease and/or the 467691-401 Lease.

13 11 U.S.C. § 365(b)(l) requires that, before a debtor can assume an executory contract
 14 or unexpired lease, that debtor must cure existing defaults and provide adequate assurance of
 15 future performance under the lease. If Marque seeks to assume the 467691-400 Lease and/or
 16 the 467691-401 Lease, it will be required to cure all pre-petition and post-petition arrears,
 17 together with attorney's fees, costs and expenses.

19 If Marque determines to reject the 467691-400 Lease and/or the 467691-401 Lease, it
 20 should be required to do so immediately in order to avoid damages to WFEFI resulting from
 21 damage to the 2016 Volvo 9700 Motor Coach and the 2015 Mercedes Benz Sprinter Shuttle
 22 Bus and/or wear and tear, age and deterioration of the vehicles and any other loss in value of
 23 the vehicles, and any administrative expenses accruing from the Debtor's continued
 24 possession and use of the vehicles without making required payments.

26 Thus, Marque should be directed to immediately pay to WFEFI, or give adequate
 27 assurance of the prompt payment of the sum of \$19,748.03, representing payment of the
 28

1 prepetition arrears as of the filing of the instant case. Such sum does not include late fees,
 2 interest, costs or attorneys' fees due under the 467691-400 Lease or the 467691-401 Lease.
 3

4 Marque has failed to provide any payments or consideration to WFEFI, yet continues
 5 to receive the benefit of the retention and use of the 2016 Volvo 9700 Motor Coach and the
 6 2015 Mercedes Benz Sprinter Shuttle Bus. WFEFI urges this Court to compel Debtor to
 7 assume or reject the 467691-400 Lease or the 467691-401 Lease immediately or within such
 8 time as the Court deems proper. In addition, if Marque elects to assume the 467691-400 Lease
 9 or the 467691-401 Lease, it must pay, or give adequate assurance of the prompt payment of
 10 the pre- and post-petition arrears. If Marque elects to reject the 467691-400 Lease or the
 11 467691-401 Lease, it should be required to immediately surrender the 2016 Volvo 9700
 12 Motor Coach or the 2015 Mercedes Benz Sprinter Shuttle Bus to WFEFI and pay all post-
 13 petition sums due to WFEFI. Notwithstanding the foregoing, WFEFI reserves the right to file
 14 a claim for administrative expenses.
 15

16 Furthermore, Section 365(d)(5) requires payment of post-petition lease payments
 17 under an equipment lease such as the 467691-400 Lease and the 467691-401 Lease from
 18 December 23, 2018 (60 days from the petition date) until the leases are rejected (if they are
 19 indeed rejected).
 20

21 **CONCLUSION**
 22

23 Based upon the foregoing, WFEFI respectfully requests that the Court enter an order
 24 requiring timely payment of post-petition lease payments under the 467691-400 Lease and the
 25 467691-401 Lease and compelling Marque to assume or reject the 467691-400 Lease and the
 26 467691-401 Lease immediately or within such time as this Court deems proper. In addition,
 27 WFEFI requests that this Court order Marque to pay, or give adequate assurance of the
 28

1 prompt payment of, all arrears due WFEFI if it elects to assume the 467691-400 Lease or the
2 467691-401 Lease.

3 Dated this 21st day of December, 2018

4
5 SMITH LARSEN & WIXOM

6 /s/ Christopher L. Benner

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